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Nos. 90-813, 90-974, 90-757 and 90-1032

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In The

Supreme Court of the United States

October Term, 1990

HOUSTON LAWYERS' ASS'N, ET AL.,

v. *Petitioners,*

THE ATTORNEY GENERAL OF TEXAS, ET AL.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,

v. *Petitioners,*

THE ATTORNEY GENERAL OF TEXAS, ET AL.

RONALD CHISOM, ET AL.,

v. *Petitioners,*

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA

v. *Petitioner,*

CHARLES E. ROEMER, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

I. Whether vote dilution challenges to state judicial elections are so different from traditional vote dilution cases that one cannot reasonably conclude that Congress intended to make judgeships subject to the 1982 amendment.

II. Whether vote dilution remedies are inherently inappropriate for state trial court judges.

III. Whether vote dilution remedies are inappropriate for state court judges because they would undercut the independence of the judiciary and violate the principle of separation of powers.

IV. Whether other possible vote dilution remedies are equally inapplicable and inappropriate in the case of judges.

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INTEREST OF THE STATE OF GEORGIA

The consolidated appeals in this case involve questions concerning the application of vote dilution principles of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, to state judicial elections. Claims of the same sort that are presented in these cases have been asserted against agencies and officers of the State of Georgia. See *Tyrone Brooks, et al. v. State Board of Elections, et al.*, Case No. CV288-146 (S.D. Ga., filed July 13, 1988). The plaintiffs there claim that the existing circuits for electing judges of the State's superior courts, which are the trial courts of general legal, equitable and felony jurisdiction, should be subjected to liability and remedies under Section 2. Specifically, the plaintiffs there claim that the existing circuits should be subdistricted into single member districts; that the State's majority vote requirement should be eliminated; and that incumbent judges should be compelled to run against one another, rather than for separate designated seats.

The outcome of the appeals in the instant case will be of great significance to the resolution of the similar claims pending in the United States District Court for the Southern District of Georgia. Moreover, the outcome of this case would affect whether similar claims might be asserted against other trial courts in the State of Georgia, and whether such claims might also be asserted against the Georgia Court of Appeals and the Georgia Supreme Court.

The State of Georgia thus has the utmost interest in the outcome of the present appeals. Amicus is of the firm belief that the Fifth Circuit Court of Appeals' rulings here

were correct, that they should be affirmed, and that Section 2 of the Voting Rights Act should not be extended to apply vote dilution theories to state judgeships.

The State of Georgia as amicus believes that a thorough statutory analysis and review of the legislative history behind the 1982 amendment to the Voting Rights Act, has been properly made by the Fifth Circuit and by other briefs filed with this Court in support of affirmance. While the State of Georgia agrees with those arguments, they will not be reiterated here. Rather, the State of Georgia wishes to bring to the Court's attention several other matters that amicus believes weigh against the extension of vote dilution principles to state court judgeships, and particularly trial court judgeships.

SUMMARY OF ARGUMENT

It is undisputed that the testimony before Congress concerning the need to amend Section 2 to create a cause of action for vote dilution related *exclusively* to traditional legislative type representative bodies – state legislatures, county commissions, city councils, and the like. Not a single witness before either the House or the Senate Committees that considered the amendment ever suggested that vote dilution principles should be applied to judges *or* that there was any need for such a drastic federal remedy in the case of judgeships.

As the Supreme Court determines whether, in its judgment, Congress intended to apply vote dilution principles to judgeships, the State of Georgia believes that the fact that the matter was never brought to Congress' attention is strong evidence that weighs against a finding that

the new vote dilution principles should apply to this area. Of equal importance, amicus believes that there are such fundamental differences, as a matter of practicality and as a matter of fact, between traditional representative bodies and judicial elections that it is not reasonable to assume that Congress would have applied vote dilution principles to judgeships if Congress had actually considered the question.

While Congress was presented with testimony in 1981 and 1982 that the underrepresentation of minorities on local elected bodies was directly caused by election systems that exclude minorities *because of their race*, the exact opposite is the case in judicial elections around this nation. While it is true that minorities generally are not present on the state court bench – or on the federal bench for that matter – in proportion to their numbers in the general population, the reason for that is not electoral discrimination. Rather, the reason is the relatively lower percentage of minorities who are licensed to practice law and who, as such, are legally qualified to serve as judges. In the State of Georgia, for example, minority candidates have been very successful in seeking election and nomination to judgeships insofar as they have tried to do so. Indeed, the percentage of blacks on the bench actually exceeds their percentage within the Bar. Although it is true that the percentage of blacks on the bench is less than their overall percentage in the population at large, the sole reason for that disparity is their relatively lower numbers in the Bar.

Since the "underrepresentation" of minority judges that the plaintiffs complain about is not the product of the kind of electoral discrimination that was the basis of Congress' action in adopting the vote dilution statute in

1982, one cannot reasonably assume that Congress would have concluded that it was necessary to impose vote dilution principles on state judiciaries. Doing so would have been a radical intrusion into traditionally state prerogatives.

In addition, as a matter of both theory and practice, vote dilution remedies are inherently contradictory to the functions of the judiciary. The function of a judge is not to "represent" persons by bringing constituents' views to the bench. To the contrary, judges are supposed to apply the law neutrally to the evidence brought before them. While subdistricting remedies allow the voice of minority communities to be manifested more aggressively in the collegial decision making of representative bodies, subdistricting would provide no such benefits to minority voters electing trial court judges. Since trial court judges act individually and each is vested with the full authority of the court, the voters of a subdistrict who might appear in a case before a particular judge would be entirely disfranchised – rather than having some new kind of fuller and more equal "political access" – whenever they appeared before a judge who happened to have been elected from a subdistrict in which the parties did not reside.

Subdistricting judges would have a variety of other undesirable consequences, not the least of which would be the impairment of judicial independence. With judges being subject to frequent reapportionment, incumbent judges would be thrown into the political thicket of redistricting. Redistricting would be performed by state legislatures under the Constitutions of most States, including that of Georgia. Drawing the judiciary into the thicket of their own reapportionment would force state judges into

a level of subservience to state legislators and other political figures that would severely impugn the judiciary's present ability to remain impartial and to render decisions based on the facts and the law presented, rather than on the parties and politics involved.

Other vote dilution principles that might apply to other offices, such as attacks on majority voting or the separation of elections into separate posts for each elected official, are equally inappropriate and inapplicable to judgeships. The State of Georgia may be unique in having had extensive experience with both majority and plurality voting – before 1964 the political parties were allowed to chose their own rule in that regard – and the experience with plurality voting was uniformly negative. The use of separate designated seats for electing judges is particularly important to avoid having incumbent judges running against one another. Requiring incumbent judges to run against one another for open seats would create pressure for those judges to make their records, whether on criminal sentencing or other matters, more prominent and "attention-catching" than that of other judges. Again, the objective of judicial impartiality would be undercut.

ARGUMENT

I. VOTE DILUTION CHALLENGES TO STATE JUDICIAL ELECTIONS ARE SO DIFFERENT FROM TRADITIONAL VOTE DILUTION CASES INVOLVING LEGISLATIVE BODIES THAT ONE CANNOT REASONABLY CONCLUDE THAT CONGRESS INTENDED TO MAKE JUDGESHIPS SUBJECT TO THE 1982 AMENDMENT.

Based on an extensive review of the language of the Act and its legislative history, the Fifth Circuit's en banc

decision in these cases concluded that vote dilution claims cannot be brought against judges under the amended Section 2 of the Voting Rights Act. The State of Georgia as amicus curiae agrees entirely with the reasoning of the Court of Appeals and with the arguments made by appellees and other amici in support of affirmance of the Court of Appeals' rulings. See also, C. Cole, *The Voting Rights Act and the Election of Judges*, 14 AM. J. TRIAL ADVOCACY 1, 44-58 (1990). Georgia will not reiterate any of those arguments here, but wishes instead to point out some additional factors that support the conclusion reached by the Court of Appeals.

All parties to these cases agree with one point – applying vote dilution principles to state judgeships would significantly intrude into an area of public policy that traditionally has been the prerogative of the States. That being the case, Congress will not be found to have usurped the States' traditional authority unless the amended Section 2 clearly and expressly states that intent. Before Congress may be deemed to have altered the "usual constitutional balance between the State and Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Will v. Michigan Department of State Police*, 491 U.S. 58, ___, 109 S.Ct. 2304, 2308 (1989). "[I]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." 109 S.Ct. at 2308-09.

The reasoning of the Court of Appeals and the arguments advanced by appellees make it apparent that the

"clear statement" of congressional intent that would be required to impose vote dilution theories on state judiciaries is lacking. But there is another critical factor which also weighs heavily against finding that Section 2 vote dilution theories apply here. That fact, simply put, is that the circumstances surrounding state judicial elections are so different from those that pertain to traditional vote dilution challenges to legislative bodies, that it would be unreasonable to assume that Congress would have made vote dilution principles applicable to judgeships if Congress had faced the question. To the contrary, it is far more likely that, if Congress had made any inquiry into this topic, it would have concluded the exact opposite, that vote dilution principles were both inappropriate and unnecessary in the area of judicial elections.

In enacting the vote dilution provision of the amended Section 2, Congress was concerned with the ability of minority groups to have an opportunity to elect representatives of their choice and to participate meaningfully in the political process. Testimony was given to Congress that at-large elections in some communities foreclosed minorities from having a meaningful role in the political process, and that minority candidates could not be elected because of their race.

The situation is entirely different, as a matter of fact, with the judiciary. To the extent that there is a disparity between the number of minority judges and the percentage of minorities in the general population, that difference arises because the percentage of persons qualified to serve as judges who are minority is much less than the minority percentage in the general population.

In the State of Georgia, for example, the Georgia Constitution requires that superior court judges be members of the Bar for seven years or more. Ga. Const., Art. VI, Sec. VII, Par. II(a). This requirement is typical of what is found in other States. No one has previously alleged that that requirement is somehow arbitrary, racially discriminatory, or illegal, yet it is that requirement alone – and not circuit-wide elections or majority vote requirements – that has determined the relative number of black and white superior court judges sitting at present.

In the State of Georgia, six of 135 incumbent superior court judges are black, or 4.4 percent. This number *exceeds* the percentage of black lawyers in the State of Georgia, which is three percent, and it substantially exceeds the percentage of lawyers who are black *and* who satisfy the minimum seven-year practice requirement.

Furthermore, black candidates who have run for judgeships in Georgia have been very successful. Starting with the most comprehensive elections, there have been three instances where black candidates have run for statewide appellate courts, one for a seat on the Georgia Supreme Court and two for seats on the Georgia Court of Appeals. *The black candidates defeated white opponents in each of these three state-wide elections.* There have been ten other judicial elections since 1970 in which black and white candidates have opposed one another for the State's major trial courts, and a black candidate won seven of those ten races.[1] In 15 additional elections, black

[1] In another of those ten races, the black candidate was unsuccessful, but neither did he carry a majority of the black voters.

candidates for these trial court judgeships have been elected without opposition.

The majority of all present incumbent superior court judges in Georgia were initially appointed to their positions. These appointments arose either through an initial appointment to a newly created seat or through the appointment of a new judge to an existing position that became vacant in mid-term. Appointments to superior court vacancies have been made by the Governor upon the recommendation of the Judicial Nominating Commission. As a matter of fact, black lawyers who have sought such appointments to superior court positions have enjoyed a success rate substantially higher than that of white applicants.

While the specific facts concerning the election and appointment history of minorities in the other 49 states naturally vary, the pattern exhibited in the State of Georgia is not uncommon in other States. Most significantly, the key question concerning minority "underrepresentation" on the bench in all States is the same. The issue does not relate principally to electoral problems, but to the fact that minority members of the Bar who are available to serve as judges are significantly fewer than the percentages of minorities in the general population.

This key issue that dominates the question of minority representation among judges is closely akin to the "qualified pool" type of issue that is part of this Court's decisions in employment discrimination and other areas. See, e.g., *Ward Cove Packing, Inc. v. Antonio,* 490 U.S. 642 (1989). It is an issue that has nothing whatsoever to do

with the vote dilution questions that were faced by Congress when it enacted the amended Section 2 of the Voting Rights Act in 1982.

The "qualified pools" of candidates for typical representative offices (legislatures, city councils, etc.) in the United States consist of all of those who have the legal qualifications to hold those offices, which generally are citizenship, residency, and some age requirement. Since the qualified pools of minority candidates for those offices, percentage-wise, are essentially the same as the percentage of minorities in the general population, Congress never had to consider this question in enacting the vote dilution principle in 1982. Neither did a single witness before Congress ever address this question in 1981 or 1982.

Had Congress addressed these questions, and had Congress considered the evidence and issues as they relate to the judiciary, it is not reasonable to assume that Congress would have concluded that the same federal legislative relief was necessary for the judiciary as for legislative offices. The basic facts and circumstances are simply too different.

II. VOTE DILUTION REMEDIES ARE INHERENTLY INAPPROPRIATE AND DEVOID OF RATIONAL JUSTIFICATION FOR STATE TRIAL JUDGES.

The remedial theory conceived of in the vote dilution decisions of this Court and the lower federal courts, is the replacement of multi-member districts and at-large elections with single member districts. See, e.g., *Thornburg v.*

Gingles, 478 U.S. 30 (1986). The purpose of that remedy is to allow minority voters who are concentrated in a particular area to elect representatives of their choice. Those minority-chosen officials then carry the views of their constituencies to the public body to which they have been elected, they advocate those views during the collegial decision making of those bodies, and the ultimate public policy decisions of those bodies presumably reflect the input of the minority-chosen candidates. Minority voters benefit from this remedy in that all of the actions of the body are presumably more reflective of and responsive to the concerns and views of the minority community.

The logic of this remedy, however, is wholly inapplicable in the case of trial court judges. State trial court judges do not act collegially as do persons elected to representative bodies, such as state legislatures, city councils, school boards, and other policy setting bodies with general legislative authority. Instead, the entire power and authority of the trial court is vested in each and every trial judge, and when judges preside over cases, they exercise all of that authority without any limitations imposed by any of the other persons who were elected as judges of that court.

As a practical matter, therefore, a minority voter would derive none of the benefits from a subdistricted trial court that he or she would derive from a subdistricted city council or other representative body. Where a minority constituent is a party before a court, the chances are that they would more likely appear, if the court were subdistricted, before a judge that that constituent had no opportunity at all to vote on. Thus, as a practical matter, if subdistricting remedies were applied

to the judiciary, minority voters would not in any way achieve some new or enhanced "equal opportunity to participate in the political process," 42 U.S.C. §1973. More often than not, the voters would instead be entirely disfranchised in connection with those actions of the local courts that might directly and personally impact on them.

This situation is entirely different from traditional cases involving representative government where minority citizens' votes are manifested in the electoral body through their elected representative. Those representatives, in turn, cast their votes on *every single* action of the legislative body. Those bodies cannot act in any other way, except through that collegial process that involves the equal actions of each of the elected representatives. That cannot occur with elected trial court judges because the functions of a court and representative bodies are so different, and judges act without any of the collegial constraints that characterize representative bodies.

III. VOTE DILUTION REMEDIES ARE PARTICULARLY INAPPROPRIATE FOR STATE COURT JUDGES BECAUSE THEY WOULD SEVERELY UNDERCUT THE INDEPENDENCE OF THE JUDICIARY AND THE SEPARATION OF POWERS PRINCIPLES THAT ARE FOUND IN THE CONSTITUTIONS OF ALL 50 STATES.

Separation of the powers of the three branches of government is fundamental to the American concept of government, both on the federal and state level. Each of the 50 state Constitutions incorporates notions of this sort, just as does the federal Constitution. See *Marbury v. Madison*, 5 U.S. 137 (1803). As a practical matter, however,

vote dilution remedies would severely undercut the independence of state judiciaries and, in turn, undermine the principle of separation of powers.

If vote dilution notions were imposed on state judiciaries and traditional subdistricting remedies arose, the political independence now enjoyed by state judiciaries would be destroyed. With judges elected from electoral subdistricts, reapportionment would be required for those subdistricts on a continuous basis. Not only would reapportionment be required with each decennial census, reapportionment would also be required on those intervening occasions when new judges were added to a court on account of increased caseloads. The court's subdistricts would have to be adjusted to reflect each new judgeship. In the metropolitan areas, for example, where judgeships are typically added each year or so, reapportionment would literally be an annual affair.[2]

As a practical matter, reapportionment of judicial subdistricts would be the function of the state legislature

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[2] While the Fourteenth Amendment does not appear to require equalization of the number of judges from circuit to circuit based on population, because the number of judges has historically been based on caseload, *New York Trial Lawyers v. Rockefeller*, 267 F.Supp. 148 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F.Supp 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966), that situation is entirely different from what would pertain with subdistrict remedies for vote dilution. With electoral subdistricts for a single court, judgeships on that court would no longer be apportioned on the basis of caseload, but rather on the basis of the population of voters within the court's circuit. If Section 2 were so construed to make judges "representatives," it would appear that one person/one vote principles would apply. Hence, decennial and more frequent apportionment would be required.

under the Constitutions of most States, and that would be the case in Georgia. With incumbent judges' districts subject to constant redrawing and political intermeddling by legislators, the independence of the judiciary would inevitably suffer. Our ideal in this country is for judges to make decisions based on their good faith perception of the law and the facts, not on the basis of the political implications and repercussions of their decisions, and not on the basis of how any one or more well-placed individuals might react to their decisions. But it is not realistic to think that a judge could wholly ignore the grave implications of his or her own reapportionment in cases where local legislators might have some interest in the outcome of a case. Since an incumbent judge's continuation in office and very livelihood would be controlled by how districts were drawn and redrawn, the threat to a judge of a punitive reapportionment would be very real. Only a rare person could completely ignore that threat.

Moreover, the interference caused by the political thicket of reapportionment would unfortunately arise frequently in a judge's normal caseload. Members of the legislature would have an interest in a wide variety of cases that routinely come before a State's trial courts. All issues dealing with the State, for example, including the constitutionality of State laws, actions to review administrative decisions, prominent criminal cases and capital cases, and a virtually endless variety of other publicly important cases would potentially demand the attention of one or more legislators. Legislators who might have a personal interest in a case, either as a party, an attorney representing a party, or simply the friend of a party or witness, would create another class of cases where a

judge's independence could be impugned, however subtly, by the fear of irritating a legislator who had reapportionment power over that judge.

These grave problems do not exist with the single-member district remedies imposed in vote dilution cases involving representative bodies. To the contrary, the political give and take of reapportionment is an accepted and proper part of the overall political process involving those bodies. But it would be antithetical to our concept of an independent, fair-minded judiciary acting impartially based on the law and the facts before the court.

IV. POSSIBLE VOTE DILUTION REMEDIES OTHER THAN SUBDISTRICTING ARE EQUALLY INAPPLICABLE AND INAPPROPRIATE IN THE CASE OF JUDGES.

While the State of Georgia understands that the issues before this court are the strict application of Section 2 to judges, and the impropriety of applying subdistricting remedies to judges, amicus would also point out that other remedies that have been considered in voting cases are equally inappropriate. One such remedy, the replacement of majority vote requirements with plurality requirements, has been sought in several recent cases by private litigants and by the Department of Justice. See, e.g., *Brooks, et al. v. Harris, et al.*, Case No. 1:90-CV1001-RCF (N.D. Ga., filed May 8, 1990); *United States of America v. State of Georgia, et al.*, Case No. 1:90-CV-1749-RCF (N.D. Ga., filed August 9, 1990). As a practical matter, however, majority vote requirements, while having little if any adverse impact on minority voters, serve compelling public interests.

It may be that the State of Georgia has unique experience in that regard because, prior to the adoption of a new and comprehensive Election Code in 1964, political parties had the option of using plurality voting or majority voting in their primary elections. Both practices were thus present in various counties throughout the State over the years prior to 1964, at the option of the local political party executive committees. As a practical matter, when the State of Georgia determined that a comprehensive Election Code should be adopted and that this authority should be taken away from the political parties, the evidence was overwhelming that plurality voting had been nothing short of disastrous from the public's point of view. Plurality voting frequently led to the perpetuation in office of unfit or outright corrupt public officials who, although opposed by a majority of the citizenry, could not be removed from office because of the plurality vote principle. Because of the ability of an incumbent, even a corrupt one, to garner a significant number of votes – whether 25 or 35 percent – incumbents proved unbeatable. They simply saw that enough other candidates qualified from different areas around the jurisdiction to successfully split opposition votes. It was not at all unusual in those cases for the incumbents and their associates to pay the qualifying fees for these other candidates. Time after time, public spirited citizens failed in their efforts to remove such people from office, even though the total votes cast by opposition forces constituted a majority of the total votes cast.

The sole argument ever advanced in favor of plurality voting when the issue was debated in 1963 and

1964 in connection with the adoption of the State's comprehensive new Election Code, was that plurality voting was cheaper. A second, runoff election, when required, naturally caused some additional expense. That argument paled by comparison to the public interest in ensuring that the will of the majority was followed and that, in particular, undesirable officials could not be perpetuated in office by plurality voting.

Those courts that have considered challenges to majority voting to date have evidenced clear hostility to the plaintiffs' claims, and for good reason. See, e.g., *Butts v. City of New York*, 779 F.2d 141 (2nd Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Whitfield v. Democratic Party of Arkansas*, 686 F.Supp. 1365 (E.D. Ark. 1988), aff'd by an equally divided court, 902 F.2d 15 (8th Cir. 1990) (en banc), cert. denied, 111 S.Ct. 1089 (1991). The efforts of various segments of the civil rights community to advance plurality voting under the guise of vote dilution principles is seriously misplaced and is very much contrary to the interests of the public at large, both majority and minority.

The use of separate designated seats (often called "numbered posts") to elect judgeships in Georgia is another practice that has been attacked, on occasion, under the guise of vote dilution principles. This practice is, as a practical matter, necessary to effectuate majority vote principles. In addition, it serves important and salutary purposes in connection with the election of judges.

The use of separate posts for electing each judge of a court ensures that that judge is not put in direct competition before the voters with other members of the court. If

posts were eliminated and judges were thrown into direct competition with one another, that would create highly inappropriate pressure on sitting judges to render rulings that would maximize their public exposure. Judges might feel pressure to impose as great as possible a sentence in criminal cases, for example, so that their sentencing record might not be unfavorably compared to other incumbent judges against whom they would be running.

The maintenance of impartial and independent judges, unaffected by immediate political concerns, is an important consideration that supports using separate designated posts for election of judgeships. Vote dilution principles contained in the new Section 2 of the Voting Rights Act should not be interpreted to undermine these practices.

CONCLUSION

For the foregoing reasons, the reasons advanced by respondents and other amici in their support, and for the reasons stated by the Fifth Circuit Court of Appeals, the State of Georgia respectfully requests that this Court affirm the decisions below.

Respectfully submitted,

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